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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 595

LEO SANDERS and JESSIE H. SANDERS, Petitioners,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

LEO SANDERS, Petitioner,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

JESSIE H. SANDERS, Petitioner,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

LEO SANDERS and JESSIE H. SANDERS, Petitioners,
versus
T. COLEMAN ANDREWS, Commissioner of Internal Revenue; ARTHUR L. FLEMING, District Commissioner of Internal Revenue for Oklahoma and Texas; and EARL R. WISEMAN, Director of Internal Revenue at Oklahoma City, Oklahoma, Respondents.

LEO SANDERS and JESSIE H. SANDERS, Petitioners,
versus
T. COLEMAN ANDREWS, Commissioner of Internal Revenue; ARTHUR L. FLEMING, District Commissioner of Internal Revenue for Oklahoma and Texas; and EARL R. WISEMAN, Director of Internal Revenue at Oklahoma City, Oklahoma, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1955.

LITTERACY TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 9-8750

SUBJECT INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	20
(1) The tax liability was settled in the compromise settlement	20
(2) Petitioners should not be held liable for tax penalties	24
(3) The Tax Court should have withheld taking action until after the District Court had exercised and exhausted its jurisdiction	26
(4) The District Court did not err in enjoining respondents from preventing the payment to Sanders of $49,279.23 admittedly due to him on a contract unrelated to any of the other matters involved herein	30
(5) The respondents are estopped to deny that the compromise settlement extinguished the tax liability	31
Conclusion	31

Appendix follows brief.

INDEX CONTINUED PAGE

AUTHORITIES

CASES:

Central National Bank v. Stevens, 169 U.S. 432, 465 28
Chicago & S. Air Lines v. Watterman S. S. Corp., 333 U.S. 103, 112-114 28
Cowell v. Heyman, 111 U.S. 176, 182 28-29
Crosley Corp. v. Hazeltine Corp. (3rd C.A.), 122 F.2d 925 29
Fisk v. Commissioner (C.A., 6, 1953), 203 F.2d 358 ..... 24-25, 26
Kline v. Burke Construction Co., 260 U.S. 226, 231 30
Miller v. Standard Nut Margarine Co., 284 U.S. 498 20
Milwaukee Gas Specialty Co. v. Mercoid Corp. (7th C.A.), 104 F.2d 589, 592 30
Old Colony Trust Co. v. Commissioner, 279 U.S. 716 27
Smyth v. Ames, 169 U.S. 465, 478 28
Speed Products Co., Inc. v. Tinnerman Products, Inc. (C.A.,D.C.), 171 F.2d 727, 729 29

STATUTES:

Internal Revenue Code of 1939, Sec. 1100 27
Internal Revenue Code of 1954, Sec. 7442 27
26 U.S.C. 1952 Ed., Secs. 291, 3653 ..... 3, 20, 24
28 U.S.C. 1254 2
28 U.S.C. 1952 Ed., Secs. 2201, 2410 ..... 3, 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 17, 1955, affirm-

ing the decisions of The Tax Court of the United States in the first three above entitled causes and reversing the decision of the United States District Court for the Western District of Oklahoma in the last two above entitled causes. In all of said causes a petition for rehearing was duly filed and considered and denied by said Circuit Court of Appeals on September 30, 1955 (App. A, *infra*, pp. i to xiv).

OPINIONS BELOW

The opinion of said United States Court of Appeals (App. A, *infra*, pp. i to xiv) is reported at 225 F.2d 629. The findings of fact and opinion by said Tax Court (R. 59 to 69) are reported at 21 T.C. 1012.

The findings of fact, conclusions of law and the order, judgment and decree by said United States District Court (R. 275 to 302) are not reported, but the opinion by said United States District Court (R. 244 to 270) is reported at 121 F. Supp. 584.

JURISDICTION

The judgments of said United States Circuit Court of Appeals were entered on August 17, 1955 (App. A, *infra*, pp. xiv and xv). The petitions for rehearing were denied by said Circuit Court of Appeals on September 30, 1955 (App. A, *infra*, p. xv). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

(1) Whether petitioners' liability for Federal taxes for 1949 was settled by a compromise settlement between petitioners and the Attorney General of the United States.

(2) Whether petitioners should be held liable for Federal tax penalties for the years here involved.

(3) Whether after the District Court had acquired jurisdiction of the controversy cases involving the same facts between some of the same parties were filed in the Tax Court, that Court should have proceeded to hear and render judgments in the cases before it before the District Court had exercised and exhausted its jurisdiction.

(4) Whether the District Court erred in enjoining respondents from preventing the payment to Sanders of $49,279.23 admittedly due to him on a contract unrelated to any of the other matters involved herein.

(5) Whether respondents are estopped to deny that the tax liability of Sanders was settled in the compromise settlement.

STATUTES INVOLVED

The statutory provisions principally involved are Sections 291 and 3653 of 26 U.S.C. 1952ed, and Sections 2201 and 2410 of 28 U.S.C. 1952ed. All of these appear in Appendix B, *infra*, pp. xvi and xvii.

STATEMENT

These cases primarily grow out of a controversy as to whether a compromise settlement made by Sanders in 1949 with the Attorney General of the United States set-

tled Sanders' Federal tax liability upon the money received in such settlement and the transactions involved in the settlement. Jeopardy assessments and liens were filed by the respondents against Sanders and his wife for a large amount of taxes, penalties and interest. In 1953 (R. 316), petitioners filed a declaratory judgment action in the United States District Court for the Western District of Oklahoma against the Commissioner, the District Commissioner, and Director of Internal Revenue for the District of Oklahoma, and the United States in which they sought to quiet their title to the property covered by such tax liens, to cancel such liens and to enjoin the collection of such taxes, penalties and interest upon the grounds that such liability had been compromised and settled (R. 220-222, 240, 242). Later in 1953 the petitioners sought a redetermination of the liability for the income tax, penalties and interest in the United States Tax Court (R. 8, 9). On March 29, 1954, the Tax Court decided that the compromise settlement did not extinguish liability for taxes, interest and penalties (R. 59-70), and on May 13, 1954, the District Court held that the compromise settlement did extinguish the liability for the taxes, interest and penalties and that the jeopardy assessments and the filing of the liens were arbitrary, capricious, vindictive and punitive and that the circumstances of the case were exceptional and extraordinary. The District Court after construing the compromise settlement held the jeopardy assessments and the liens involved, enjoined the collection and enforcement thereof and quieted the title to the property covered by the liens (R. 244-270, 275-302). The Government admittedly owed Sanders over $49,000.00, on a matter unrelated to the assembly plant con-

struction. Respondents ordered payment stopped and the money applied to the supposed tax liability (R. 294). The District Court ordered the removal of their stop order (R. 301-302).

All of these cases were consolidated in the Court of Appeals, which reversed the decision by the District Court and affirmed the decisions by the Tax Court (App. A, *infra*, p. ii).

Leo Sanders had been engaged in the general contracting and heavy construction business for many years (R. 85, 323). After seventy-six contractors had refused to bid on the contract the District Engineer of the Army at Tulsa conferred with Sanders urging him to bid on the excavation, concrete work and paving at the proposed Oklahoma aircraft assembly plant to be erected near Oklahoma City. Further negotiations followed and on June 6, 1942, Sanders and the United States entered into a contract for such work. Construction work began at once and was completed in May, 1943 (R. 86, 90, 325, 348, 356, 551, 552, 556).

During the construction period, many changes were made in the plans and specifications, including the requirement that the completion of much of the work be accelerated, all of which greatly increased the cost of construction. Sanders filed claims for additional compensation. Congress appropriated over $1,600,000.00 to pay such claims. Although departmental determination of all of such claims had not been completed by the War Department, Sanders in May, 1949, in order to prevent the running of the Statute of Limitations brought an action in the United States

Court of Claims and sought a judgment for $2,254,420.37. The Attorney General of the United States took charge of the defense of the case. Representatives of the Attorney General conferred with Sanders, his attorneys and accountants seeking to work out a compromise settlement (R. 86-88, 90, 325-327, 331, 332). During these conferences an examination of Sanders' tax records and returns was made by the attorney and accountant representing the Attorney General (R. 91, 106, 107, 118, 331, 362, 363, 427, 455), and Mr. Palmes, the attorney, told Mr. Sanders that he should not be worrying about how much he was going to get as he was going to have a tax problem on his hands and was going to need a good tax lawyer (R. 131, 151-155, 426).

The appropriation was to expire on June 30, 1949. The last negotiations about a settlement occurred in Washington on June 27, 28 and 29, 1949. During these last negotiations Palmes suggested a figure of $940,000.00 which Sanders refused to accept.

Palmes told Sanders that by accepting that amount of money he would not have any income taxes to pay, that there would be no renegotiation, that he wanted to make Sanders whole, and that Sanders would be in a most enviable position. Sanders and Palmes, on June 28, 1949, went to see Peyton Ford, the Acting Attorney General, and Sanders requested Ford to review the offer that Palmes was making (R. 91, 107, 108, 113, 118, 119, 128, 129, 130, 142, 332, 362, 455).

Ford said everything between Sanders and the Government had to be settled once and for all and that he meant everything and that he wanted all claims settled. He said

that he wanted this to be a final settlement and not reopened in any manner. At the time of the settlement Ford insisted that all claims by the Government against Sanders be included in the settlement (R. 92, 119, 199, 200, 332, 333). Sanders understood from the statements of Ford and Palmes that the settlement included taxes and everything else of every nature and relying upon this the next morning, June 29, 1949, Sanders agreed to and did accept the compromise settlement that had been proposed by Palmes, which he would not have done had he believed that he was going to be assessed taxes, penalties and interest in excess of $1,000,000 on the $940,000 (R. 92, 93, 115, 333).

During the conferences there was no thought of paying Sanders a profit on his contract, but the thought was "to make him whole" (R. 119, 128, 129, 333, 455). Sanders made no profit on the contract but sustained a loss. He was not "made whole." Sanders was led to believe by those representing the United States in said compromise settlement that no profit would be or was paid to him in said settlement. Sanders did believe that no profit was paid to him in such settlement and relied upon such belief (R. 96, 333, 347, 348, 355, 356, 455, 551, 552).

It was understood that the settlement was to be consummated in the form of a supplemental agreement with the War Department (R. 92). Palmes then prepared an offer of settlement, an acceptance of the offer, and a motion to dismiss the case in the Court of Claims to be held in escrow and filed upon receipt of the money by Sanders (R. 94, 334, 361, 431). This was all done in a great hurry, as Sanders had to go from Washington to Dallas and Ft. Worth

to sign the supplemental agreement and to get his money on June 30, 1949 (R. 92, 94, 116, 142, 143, 197, 337, 338, 431, 432, 454).

The offer of settlement reads in part (R. 334, 335; E.B. tab 3):

"My dear Mr. Attorney General,

"I hereby offer to accept the sum of $954,100.00, which includes bond premium of $14,100.00, in full settlement of all claims which are included in the above entitled suit and of all claims growing out of Contract W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant near Oklahoma City, Oklahoma. To this should be added the payment of retained percentage in the amount of $1,001.71, making a total of $955,101.71. * * *

"LEO SANDERS."

The Department wrote the acceptance of the offer which reads in part (R. 92, 93, 335, 337, 432):

"Dear Mr. Sanders:

"This is to inform you that your offer to compromise the above entitled case for the sum of $954,100 (which sum includes a bond premium of $14,100), in full settlement of the claims set forth in the petition in the above entitled case and all claims growing out of contract No. W-957-eng-968, covering the construction of certain work in connection with the Oklahoma Aircraft Assembly Plant, near Oklahoma City, Oklahoma, has been accepted by the Attorney General. * * *

"Please be advised that the acceptance of your offer to compromise and the filing with the Court of Claims of your Motion to Dismiss the petition * * * covers all

claims arising out of the contract whether or not they are set forth in the petition * * *.

"For the Attorney General
"Newell A. Clapp

"Acting Assistant Attorney General."

The motion to dismiss the action was prepared by Palmes and signed by Sanders and reads as follows (R. 92, 337, 368):

"Comes now the plaintiff and shows to the Court that the plaintiff and defendant, acting through the Attorney General, have agreed upon an amount by way of compromise and settlement of all claims set forth in the petition in the above-entitled suit and of all claims growing out of Contract No. W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant near Oklahoma City, Oklahoma.

"Wherefore, plaintiff moves the Court that the above-entitled suit be dismissed with prejudice."

The motion to dismiss and offer and acceptance were signed on June 29, 1949; and after he learned that the Attorney General had accepted his offer, Sanders on the night of June 29 caught a plane from Washington for Dallas, where he signed the supplemental agreement and from there he went to Ft. Worth where he got a check for the money on June 30, 1949 (R. 94, 337, 338, 339). Before said money was paid, the supplemental agreement was prepared by Government representatives, signed on behalf of the United States in Tulsa by the District Engineer Contracting Officer and by Sanders in Dallas (R. 98, 181, 185, 186, 338, 431). It contains the following paragraph:

> "Upon payment of the above amount agreed to as a compromise settlement, and retained percentage in the amount of $1,001.71, all matters between the Contractor and the Government arising by reason of or in connection with Contract No. W-957-eng-968 will have been settled, and, the contractor hereby releases the Government from any and all claims now filed or to be filed in the future, arising from or in connection with Contract No. W-957-eng-968, as amended."

Before signing this supplemental agreement, Sanders objected to the language employed for the reason it was not sufficiently definite but was assured by Government representatives that it was the most inclusive language that could be used. After this assurance Sanders signed the supplemental agreement (R. 94, 109, 110, 338, 364). Before the representatives of the Government at Tulsa prepared the supplemental agreement they talked on the telephone with Palmes and a representative of the War Department both of whom were in Washington and advised that the settlement was to be in full settlement of everything and they practically dictated the terms of the agreement from Washington (R. 128-185).

During the interim from the date the construction work was completed in 1943 to the date of the compromise settlement in June, 1949, the filing of income tax returns by Sanders posed various problems. He was an old friend of the then Collector of internal revenue at Oklahoma City, with whom he had many consultations with reference to filing returns for these years. Sanders told the Collector the condition everything was in, that he had large claims pending and that he had lost everything and did not know

where he would come out. Extensions of time were also discussed with the then Collector who told Sanders to file tentative returns and amended or corrected returns later when he got the matter straightened out. Sanders did file a return for each year within the time provided by law, or within the time of extensions granted (R. 97, 98, 102, 369, 370, 373, 468, 469, 536; E.B. tabs 11, 12, 14, 16, 18). Waivers were executed by Sanders at the request of John P. Hulsey, a revenue agent who was assigned to work on Mr. Sanders' tax matters, extending the time for assessment and collection to June 30, 1953 (R. 177, 178, 502, 503). These returns were tentative and in no sense completed returns, as Sanders was unable to determine whether he would make a profit on the contract, or sustain a heavy loss (R. 369, 370, 373, 456, 468, 469, 473, 474). He explained why the returns were tentative in a letter attached thereto, or when requesting an extension (R. 469, 474, 475, 571-578).

Mr. Sanders showed the Collector his check in settlement of his claims the very next day after he received it and told him that he thought the taxes on the money received had been settled in this settlement (R. 190, 469).

On account of his failure to receive what was due him under the contract, Sanders was short of help and his bookkeeping was more or less confined to receipts and expenditures, and his office force became so burdened with details they were unable to complete what would be ordinary records. After the compromise settlement was received, Sanders employed certified public accountants to bring his books to date and prepare amended returns, and a tax attorney, whose advice in the legal matters concern-

ing the preparation of said returns was followed by the auditors. The accountant was unable to get the books in condition to make complete tax returns for the years involved until the latter part of 1952. After Sanders employed the accounting firm and the attorney he followed their advice and depended upon them to prepare the necessary tax returns (R. 96, 97, 99, 104, 105, 116, 119, 120, 121, 122, 127, 128, 135, 136, 166, 167, 169, 170, 172, 346, 371, 372, 373, 456, 457, 458, 464, 468, 537, 538, 541, 542, 550-552).

John P. Hulsey was the internal revenue agent assigned to work on Sanders' tax matters. Sanders advised him that he could not file amended or complete returns until there was a settlement on the contract—that until that time he would be unable to determine whether he had a profit or a loss. On August 17, 1951, Hulsey recommended a deficiency tax against Sanders for the years 1939 to 1944, inclusive, in the amount of $960,297.39 plus a five per cent negligence penalty in the amount of $48,038.87 and a deficiency tax of $38.58 for the year 1941 against Mrs. Sanders (R. 167, 580-592). Hulsey was not certain for what years the money received in the settlement should be reported (R. 173), and recommended the assessment be based upon spreading the money received over the years 1939 through 1944, and therefore he charged Sanders with an income item of $250,000.00 each year for the years 1939 through 1944, except 1942, or a total of $1,250,000.00 (R. 580-592). Hulsey's reasons for making the above recommendation and his indicated basis for such computation of tax and penalty amounting to $1,008,336.26 on receipt by Sanders of

the $940,000.00 may be best revealed by Hulsey's own testimony as follows (R. 510, 511):

> "Q. I am handing you a letter addressed to Leo Sanders of August 17, 1951, which purports to include a report by you for the years 1939, '40, '41, '43 and '44. That is your report, is it not? A. That is right. Q. Now, in that I notice you recommend a deficiency tax of $960,297.39. Isn't that right? A. I think it is, yes, sir. Q. And you recommend a penalty of only $48,000, which is 5%. Now how do you account for that? A. I was recommending a negligence penalty. Perhaps there should have been a negligence penalty put on this because he was negligent in preparing his returns. Q. (By the Court) What was that? A. A negligence penalty of 5%. Q. (By Mr. Galloway) What do you call 25%. A. Delinquency penalty; two different penalties. May I explain this. When I couldn't get him to prepare his returns, I made this just based on an estimate and put it in these years because he had stated that is where his income was, back in these years when he was doing this work. Q. Who is 'he'? A. Mr. Sanders. Q. He told you that, did he? A. I got the impression from him that he made his income prior to 1945. Q. From him or his accountant? A. From him. Those are just estimates, trying to wake him up. Q. This was in August, 1951, and he had received this money in June of 1949? A. Yes, sir. Q. Or two years before, but you assessed him a 5% tax or penalty for negligence, but a year later you hit him with a 25% tax penalty, didn't you? A. Yes, sir. I hated to put that 5% on that, too. Q. (By the Court) Has there been any feeling between you and Sanders? A. No, sir, not until this jeopardy assessment went on, while we argued quite a bit. We tried to examine the books. We would get heated a little bit once in a while but it was in a minor way. I knew he wouldn't like it about me putting this

jeopardy assessment on, but I felt like something had to be done or the Government wouldn't ever collect any tax on this. He didn't want to file a return. He was doing away with his assets—Q. Did it ever occur to you the course you took was rather a severe one? A. Yes, sir. Q. And it would destroy him absolutely eventually? A. I was afraid it would."

In July, 1952 Sanders filed amended returns for the years 1939 through 1948, as prepared by his accountants with the assistance of his tax attorney (R. 99, 456, 457, 537). Sanders thought he owed no tax for 1949 (R. 469).

On September 10, 1952, Sanders received by personal delivery from two men from the office of the Collector six "Statements of Income Tax Due" all dated September 10, 1952. Said statements were for the following years and amounts respectively: Leo Sanders for 1939 for $27,848.61 tax and $20,861.66 interest; Leo Sanders for 1941 for $16,-883.16 tax, $8,595.38 interest and $4,227.04 penalty; Leo Sanders for 1944 for $1,194.18 tax, $536.32 interest and $298.54 penalty; Leo Sanders for 1946 for $21,146.62 tax, $6,959.55 interest and $5,786.65 penalty; Leo and Jessie H. Sanders for 1949 for $688,710.84 tax, $102,693.38 interest and $172,177.71 penalty; Jessie H. Sanders for 1946 for $19.86 tax, $6.54 interest and $4.92 penalty (R. 99, 100, 339, 340; E.B. tab 7). At the same time said men from the Collector's Office delivered to Sanders jeopardy assessments and notices of distraints all dated September 10, 1952, covering the taxes, interest and penalties for the years and in the amounts just above stated (R. 99, 100, 341). Prior to the receipt of said "Statements of Income Tax Due" and said jeopardy assessments and notices of distraint Sanders

had no notice of any of such assessments (R. 342, 469, 470, 496, 503, 537-539). At the same time these messengers were delivering these statements and jeopardy assessments to Sanders other messengers were filing liens thereon in the Office of the Clerk of the District Court.

On September 10, 1952, Sanders contended and believed that he owed no tax for 1949 (R. 347, 364). He conferred with the then Collector of internal revenue who suggested that Sanders file a 1949 return on a capital gain basis, make payment thereon, and if no tax was owing, he would receive a refund of the amount paid. The Collector said he thought that would solve the situation and remove the jeopardy assessment and distraint (R. 100, 101, 346, 347, 458). Promptly, on September 12, 1952, Mr. and Mrs. Sanders filed an amended joint income tax return for 1949 in which they reported for taxation on the long-term capital gain basis the $940,000.00 received in the settlement and paid a tax of $247,694.44 by check and credit (R. 101). No part of said sum has been repaid or refunded to them. On October 20, 1952, the Commissioner made an assessment thereon for a tax liability of $235,768.93 penalty of $58,942.23 and interest of $35,271.68, gave a credit of $235,-768.93, or a net penalty and interest of $94,213.91, and made a further jeopardy assessment of said amounts (R. 343, 354, 355, 465, 466). On November 7, 1952, the Commissioner assessed a penalty against Mr. and Mrs. Sanders for 1949 of $17,095.90 (R. 567), making a total of taxes, penalties and interest of $1,074,491.74. A joint return for 1950 reflected a loss of $78,278.13 and no tax liability, on which the Commissioner determined a loss of $84,465.15 and an overassessment of $100.00.

It was impossible for Sanders to determine at any time between 1943 and 1949 whether he had income in any of those intervening years, and the filing of tentative annual returns estimating his income or loss was done at the suggestion of the collector and for the purpose of avoiding delinquency penalties. Sanders believed that up until 1949, when he made the compromise settlement, his loss was approximately $2,000,000.00 (R. 97, 98, 355, 356, 364, 369, 370, 456, 464, 468, 551).

Mrs. Sanders depends altogether on Mr. Sanders to take care of her income tax matters as she is not at all familiar with such matters and only in a general way with his business affairs (R. 102, 103, 340).

On October 29, 1952, a further jeopardy assessment was made against said Leo and Jessie H. Sanders for the year 1949 in the sums of $235,768.93 tax, $58,942.23 penalty and $35,271.68 interest. They had already paid in cash $235,768.93 and a credit of $11,925.51. The Commissioner credited these amounts to the $235,768.93 tax so assessed but issued no deficiency notice upon the assessment of the tax, penalty and interest (R. 180, 343, 350, 351, 355, 565; E.B. tab 9).

This assessment was based upon the $940,000.00 received by Leo Sanders in 1949 as above set out on a long term capital gain basis, which was the same $940,000.00 upon which a jeopardy assessment of $688,710.84 tax, $172,177.71 penalty and $102,693.38 interest had been made on September 10, 1952. Respondents admit it is a duplication, improper and should never have been made (R. 180, 350). They claim that some time after the suit was filed in the

District Court, such assessment has been or will be abated and the $235,768.93 applied against the $688,710.84 tax assessed for 1949 on September 10, 1952. They fail to explain what will be done with the $11,925.51 (R. 400, 406, 516, 517, 533).

Respondents have conceded that they have made jeopardy assessments and asserted liens against Mr. and Mrs. Sanders of $235,768.93 in tax and $58,942.23 penalty and $35,271.68 interest more than could possibly be due (R. 350, 351, 400-406). They assert that they have not and will not remove the liens filed or remove any part thereof until the lien has been paid in full (R. 407, 408, 517, 518, 520, 521). Mr. Sanders has frequently requested the removal of the liens (R. 351).

At the completion of the work on the plant in 1943, Sanders had invested all of his own money and much borrowed money in that job for which he had not been reimbursed. He had no money with which to operate his business and was heavily in debt (R. 96, 116, 343, 550). During that construction work he had used his equipment continuously and had taken little time out for repairs. At the end of such work the equipment was badly in need of extensive repairs but Sanders then had no money or resources left with which to make such repairs (R. 349, 368, 467, 468). Because of such things Sanders was able to do only a very little business until he received the money from said settlement (R. 105, 116, 190, 343, 355). After receiving said money he paid his remaining debts, completed the repairs on the equipment, purchased much new

equipment and reestablished his credit and bonding capacity (R. 343, 349, 467, 468).

After receiving the money from the settlement and prior to the making of said jeopardy assessments, the giving of said notices of distraint and the filing of said tax liens as above set out Mr. Sanders had assembled and owned a large amount of heavy construction machinery and equipment with which to perform large construction contracts. He also had the necessary capital or credit and bonding capacity to enter into and perform such contracts (R. 343, 345, 350, 352). He personally had the necessary experience and a sufficient organization with which to undertake such work. All of these things were and are necessary to undertake and perform the large construction jobs which he was equipped and accustomed to handle. Just prior to this time Sanders was actively engaged in bidding on various large construction projects (R. 344, 350, 352).

When said assessments, notices of distraint and tax liens were made and filed Mr. and Mrs. Sanders did not have and had no way to procure the money or other assets with which to pay the large amounts asserted (R. 342). With such assessments, notices of distraint and tax liens outstanding they could not procure bonds to stay the enforcement thereof, and Mr. Sanders was unable to procure the necessary money, credit, and bonds to engage in his construction work (R. 343, 344, 345, 350, 366, 367). The notices of distraint stated that unless the money demanded was paid respondents would seize and sell Mr. and Mrs. Sanders' property.

Because of these things Sanders has been and will continue to be unable to engage in the construction business unless and until said assessments, distraints and liens are removed and has been and will continue to be unable to use his abilities, experience and equipment and to make a living for himself and his family. Since said assessments, distraints and liens were asserted Mr. Sanders has been unable to earn a living, and he and his equipment have been idle. Since that time he has had great difficulty in raising even a little money with which to try to protect and preserve his property and equipment and upon which to live (R. 343, 344, 366, 367).

Sanders had a small contract with the United States which was terminated in 1951, involving the storage of experimental fuels. Upon that contract there is an admitted balance due to Sanders from the United States of $49,279.23. Respondents have demanded that this money be transferred by the War Department to them to be applied upon Sanders' taxes and by such notices and demands have prevented payment of said sum by the War Department to Sanders (R. 352, 353).

Sanders did not make a profit from his construction of the excavation and concrete work at the plant even after he received the payments made to him in 1949 (R. 347, 348, 355, 356, 551).

The property of Mr. and Mrs. Sanders would bring only a small amount at a forced sale and would bring only a small portion of its real value (R. 352).

The collection of the taxes, penalties or interest assessed or the enforcement of the liens or distraints asserted

would ruin and destroy Sanders financially and would cause him irreparable injury for which he has no adequate remedy (R. 353, 509).

Respondents challenged the jurisdiction of the District Court urging that 26 U.S.C. 1952ed, Sec. 3653 (App. B, *infra),* prohibited the granting of an injunction and that 28 U.S.C. 1952ed, Sec. 2201 (App. B, *infra),* prohibited the maintenance of a suit for declaratory judgment. The District Court held that the compromise settlement extinguished the tax liability, the assessments, liens and penalties were illegal, improper, arbitrary, capricious, vindictive and punitive and the circumstances of the case were exceptional and extraordinary and applying the principles enunciated by this Court in *Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498, held that it had jurisdiction and authority regardless of the provisions of Sections 3653 and 2201, *supra.* The Court of Appeals said it was unnecessary to consider the jurisdiction of the District Court (App. A, *infra,* p. iii).

REASONS FOR GRANTING THE WRIT

(1) The tax liability was settled in the compromise settlement.

The District Court found as a fact and decided that the compromise settlement included a settlement of the Federal tax liability. The Tax Court held that it did not. The Court of Appeals held "that there is a total lack of evidence" to show that the tax liability was included in that settlement. Certainly the findings of fact by the District Court are entitled to great weight. Furthermore, for

the Court of Appeals to hold that there was a total lack of evidence to show that the tax liability was included such Court must disregard the testimony of Sanders and his assistant. The testimony of his auditor, who was present part of the time, in fact supports the testimony of Sanders and his assistant. The mere fact that the auditor did not hear taxes mentioned is fully explained when we give effect to the auditor's statement that he was in and out of the room and was not present all the time and had some phone calls while the talk was going on (R. 128-130).

The Court of Appeals seems to have relied heavily upon the theory that Palmes did not have authority to settle the tax liability. This ignores the activities and statements of Peyton Ford, the Acting Attorney General who was also an Assistant Attorney General. Ford (not Palmes) was the one who approved and accepted the settlement. He conferred with Sanders and others and insisted that all claims by the Government against Sanders be included in the settlement (R. 92, 119, 199, 200, 332, 333). Certainly Ford had all the authority which vested in the Attorney General. Respondents did not contend in the Court of Appeals that the Attorney General and Ford did not have authority to settle the tax matter.

In this connection it is much more than a matter of passing interest to recall the undisputed facts that Sanders sought in his suit in the Court of Claims to recover $2,254,-420.37. Congress had appropriated $1,674.030.26 to pay these claims; Sanders was urging that the settlement be for at least the amount of the appropriation (R. 331, 332, 425, 426); the cash paid on the settlement was $995,101.71;

the tax (exclusive of penalties and interest) assessed, considering the entire cash payment as ordinary income, was $688,710.84 which added to the cash paid totals $1,643,-812.55 or within about $30,000.00 of the amout of the appropriation.

The Court of Appeals also relied upon the fact that after the first jeopardy assessments Sanders filed amended returns and reported the amount received in the settlement as income to be taxed on a long term capital gain basis. In so doing the court below gave no effect to the undisputed fact that Sanders did this upon the advice of the then Collector of Internal Revenue who thought this would remove the jeopardy assessments and liens and that then Sanders could get a refund of the tax so paid if he did not owe such tax.

The Court of Appeals also concluded that there was nothing in the written documents that included the tax liability and said that oral statements are not admissible to create additional undertakings. Petitioners do not seek to add to or to change the writings involved. They merely go to the negotiations to show what was meant by the terms used in those writings all of which were prepared by the representatives of the Government and must therefore be most strongly construed against it.

The offer said the settlement was in full settlement of all claims in the Court of Claims suit "and of all claims growing out of Contract W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant" (R. 207-208). The acceptance said it was in full settlement of the claims set forth in the petition in the suit in the Court

of Claims "and of all claims growing out of" the contract and further said that it "covers all claims arising out of the contract whether or not they are set forth in the petition" (R. 208-209). The motion to dismiss said it was by way of compromise and settlement of all claims set forth in the petition "and of all claims growing out of Contract No. W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant" (R. 210). The settlement agreement refers to it as a "settlement of all claims under or arising out of said contract" and further says that upon payment of the amount agreed to as a compromise settlement "all matters between the Contractor and the Government arising by reason of or in connection with Contract No. W-957-eng-968 will have been settled" (R. 211). Considering alone the bare words of the documents we have a release of tax liability upon the money paid upon matters arising "by reason of or in connection with the contract." Had there been no contract there would have been no money paid and hence no tax question as a matter arising by reason or in connection with the contract. Likewise it is something growing out of the contract and "the construction" of the plant as stated in the motion to dismiss. Furthermore it is something "growing out of" the contract as stated in the acceptance. It is also a matter "growing out of the contract" and out of "the construction" of the plant as set out in the offer.

From the foregoing it is clear that the settlement included other things than the claims pending in the Court of Claims. At the time of these writings all claims growing out of the work and the construction of the assembly plant,

except the claims pending in the Court of Claims and the tax liability on the money received, had been barred by the statute of limitations.

It is a matter of public importance that citizens dealing with high officials of our Government should be able to rely upon what they are lead by such officials to believe and should not be subjected to "arbitrary, capricious, vindictive and punitive" (as found by the District Court) actions as were petitioners in this case.

(2) Petitioners should not be held liable for tax penalties.

Title 26 U.S.C. 1952ed, Sec. 291 (App. B, *infra*), provides for a penalty of five per centum for each 30 days or a fraction thereof (but not to exceed 25 per centum in the aggregate) of a failure to file tax returns when due "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The District Court held that petitioners had established reasonable cause and that they were not guilty of willful neglect. The Tax Court decided to the contrary. The Court of Appeals said "The record discloses sufficient evidence to sustain the decisions by the Tax Court in upholding the assessment of penalties and interest."

The law upon this question is well stated in the decision in *Fisk* v. *Commissioner* (C.A., 6, 1953), 203 F.2d 358. In striking down a penalty sustained by the Tax Court the Court of Appeals there said:

> "We think the addition of the penalty constituted error as a matter of law. The question of the existence of reasonable cause is in the first instance one of fact

for the Tax Court (*Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 225) which must decide whether the elements which constitute reasonable cause are present in a case. What elements must be presented to constitute reasonable cause is a question of law. *Hatfried, Inc.* v. *Commissioner*, 162 Fed.(2d) 628, 635 (C.A. 3); *Haywood Lumber & Mining Company* v. *Commissioner*, 178 Fed.(2d) 769 (C.A. 2). Reasonable cause means nothing more than the exercise of ordinary business care and prudence. *Haywood Lumber & Mining Company* v. *Commissioner, supra; Orient Investment & Finance Company, Inc.*, v. *Commissioner*, 166 Fed.(2d) 601 (C.A.D.C.); *Southeastern Finance Company* v. *Commissioner*, 153 Fed.(2d) 205 (C.A. 5). Various courts have held as a matter of law that reliance upon an attorney or an accountant for making out and filing of tax returns constitutes reasonable care. Cf. *Dayton Bronze Bearing Company* v. *Gilligan*, 281 Fed. 709 (C.A. 6), certiorari denied, 258 U.S. 619; *Haywood Lumber & Mining Company* v. *Commissioner, supra; Orient Investment & Finance Company, Inc.*, v. *Commissioner, supra.* The Tax Court has repeatedly decided that reliance upon counsel constitutes reasonable cause for failure to timely file necessary tax returns. *The C. R. Lindback Foundation* v. *Commissioner*, 4 T.C. 652; *Brooklyn & Richmond Ferry Company, Inc.* v. *Commissioner*, 9 T.C. 865; *Safety Tube Corporation* v. *Commissioner*, 8 T.C. 757; *Diana McFadden Houk*, 6 T.C. Memo. 649."

Here petitioners could not file final returns until they got the money from the settlement because they did not know what they would get and whether there would be a profit or a loss. Furthermore, they did not have any money with which to have the necessary accounting work done in order to prepare final returns. But in the meantime they kept the Collector fully informed and at his

suggestion filed tentative returns and signed waivers of time for making assessments. After petitioners got the money from the settlement they employed accountants and a tax attorney to prepare the final returns and depended upon them to do so. The accountants and the tax attorney did prepare and file final returns as soon as they could get them ready. What more could a reasonably prudent business man do? Certainly there was no willful neglect. Petitioners have found no other decisions indicating that the course they pursued was not proper. It is believed that the decision by the Circuit Court and the Tax Court is in conflict with the decision by the Circuit Court in *Fisk* v. *Commissioner, supra,* as well as the decisions cited in the quotation above made from the *Fisk* case.

(3) The Tax Court should have withheld taking action until after the District Court had exercised and exhausted its jurisdiction.

Petitioners had filed their suit in the District Court and that court had acquired jurisdiction before any petition was filed in the Tax Court. During the hearing of evidence in the Tax Court the attention of that court was called to the suit then pending in the District Court and to the fact that the evidence had then been closed and the case set for argument in the District Court and the question of comity between the courts was suggested to the Tax Court (R. 101, 201, 202). After the Tax Court had rushed to its decision on the merits and the District Court had rendered its decision the petitioners in a motion for a rehearing and reconsideration in the Tax Court again presented this situation to the Tax Court and urged that it

withdraw its decision and withhold further action until the District Court had exercised and exhausted its jurisdiction (R. 71-72). This motion was denied the same day that it was filed (R. 72). The same question was presented in the Court of Appeals (R. 74-79), but that Court did not mention such question in its decision (See Appendix A, *infra*).

This action by the Tax Court and the Circuit Court violates the rules of comity between courts and if it stands impairs the jurisdiction of the District Court.

In this connection it should be remembered that the District Court is a Constitutional Court and a part of the judicial branch of the Government while the Tax Court is a body (formerly designated as a Board of Tax Appeals) which has been given the name of a court by the Legislative Branch but which is recognized as a part of the Executive Branch of the Government (Sec. 1100, Internal Revenue Code of 1939; Sec. 7442, Internal Revenue Code of 1954; *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716).

It is unthinkable that a part of the Executive Branch would be permitted to thwart, limit or impair the jurisdiction, power or authority of a Constitutional Court.

Moreover the action of the Tax Court would deprive Mr. and Mrs. Sanders of an opportunity to effectively invoke the jurisdiction of the District Court.

Petitioners could not be deprived of their right to sue in the District Court on account of being allowed to file petitions with the Tax Court.

"One who is entitled to sue in a Federal court may invoke its jurisdiction in equity whenever the established rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."—*Smyth* v. *Ames*, 169 U.S. 465, 478.

To deprive a District Court of its power to act, once its jurisdiction is invoked, is to essentially impair its jurisdiction.

"But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction."—*Central National Bank* v. *Stevens*, 169 U.S. 432, 465.

"Judgments within the powers vested in the Federal courts by the judiciary article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another department of government." —*Chicago & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 112-114.

The following remarks of the Supreme Court of the United States in *Cowell* v. *Heyman*, 111 U.S. 176, 182, are especially pertinent here:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or mere convenience. Those courts do not

belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues. 'The jurisdiction of a court,' said Chief Justice Marshall, 'is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised.' *Weyman* v. *Southard*, 10 Wheat. 1."

In *Crosley Corp.* v. *Hazeltine Corp.* (3rd C.A.), 122 F.2d 925, at page 929, the Court said:

"* * * It was long ago laid down by Chief Justice Marshall as a salutary rule that 'In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it.' *Smith* v. *McIver*, 9 Wheat. 532, 535, 22 U.S. 532, 535, 6 L. Ed. 152."

In *Speed Products Co., Inc.* v. *Tinnerman Products, Inc.* (C.A.,D.C.), 171 F.2d 727, 729, the Court said:

"* * * Where two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first, and an injunction to accomplish this is proper."

In *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.* (7th C.A.), 104 F.2d 589, 592, the Court said:

> "The general rule is that the court first acquiring jurisdiction is entitled to maintain it until its duty is fully performed, and the jurisdiction involved is exhausted."

In *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 231, this Court said:

> "The rule is not only one of comity, to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons, * * *. 'It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience'."

(4) The District Court did not err in enjoining respondents from preventing the payment to Sanders of $49,279.23 admittedly due to him on a contract unrelated to any of the other matters involved herein.

The Court of Appeals erroneously reversed the action by the District Court. There can be no doubt that the money was due to Sanders. Respondents stopped payment to him and sought to have it applied to payment of the taxes which they claimed Sanders owed. It necessarily follows that if Sanders did not owe the taxes and the assessments and liens were improper and invalid, this money admittedly otherwise due should be paid. It has been hereinbefore shown that the District Court properly decided that the taxes, penalties and interest were improper and invalid. Therefore the removal of the hinderances to the payment of the $49,279.23 was proper.

(5) The respondents are estopped to deny that the compromise settlement extinguished the tax liability.

The Tax Court did not pass upon this question although the issue was presented to it (R. 33, 34). The Circuit Court held that the Government could not be estopped by the unauthorized acts of its agents (Appendix A, *infra*), and held that Palmes had no authority. As heretofore pointed out this ignores the fact that it was Ford, the Acting Attorney General, who was also an Assistant Attorney General, who accepted and approved the settlement. He also talked with Sanders. Ford had all of the authority which vested in the Attorney General. Respondents did not urge in the Circuit Court that the Attorney General did not have authority.

CONCLUSION

For the reasons heretofore stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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December, 1955.

APPENDIX A

United States Court of Appeals
TENTH CIRCUIT

MAY TERM, 1955

No. 4968
LEO SANDERS and JESSIE H. SANDERS, Petitioners,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 4969
LEO SANDERS, Petitioner,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 4970
JESSIE H. SANDERS, Petitioner,
versus
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 5024
T. COLEMAN ANDREWS, Commissioner of Internal Revenue; ARTHUR L. FLEMING, District Commissioner of Internal Revenue for Oklahoma and Texas; and EARL R. WISEMAN, Director of Internal Revenue at Oklahoma City, Oklahoma, Appellants,
versus
LEO SANDERS and JESSIE H. SANDERS, Appellees.

No. 5070
T. COLEMAN ANDREWS, Commissioner of Internal Revenue; ARTHUR L. FLEMING, District Commissioner of Internal Revenue for Oklahoma and Texas; and EARL R. WISEMAN, Director of Internal Revenue at Oklahoma City, Oklahoma, Appellants,
versus
LEO SANDERS and JESSIE H. SANDERS, Appellees.

Numbers 4968, 4969 and 4970
ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

Numbers 5024 and 5070
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(August 17, 1955)

Herman J. Galloway (Dan Moody and John E. Marshall were with him on the brief), for appellant.

[APPENDIX A]

Homer R. Miller (H. Brian Holland, Asst. Atty. Gen., and Ellis N. Slack Special Asst. to the Atty. Gen. were with him on the brief), for Commissioner.

Before BRATTON, HUXMAN and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

These cases grow out of deficiencies in income taxes, penalties and interest for the years 1943, 1944, 1946 and 1949 assessed against Leo Sanders and his wife, Jessie H. Sanders.[1] Jeopardy assessments and liens were then filed. On January 26, 1953, the taxpayers filed a declaratory judgment action in the United States District Court for the Western District of Oklahoma against the Commissioner, the District Commissioner, and the Director of Internal Revenue for the District of Oklahoma in which they sought to quiet title in the taxpayers to certain property, to cancel certain liens, and to enjoin the collection of income taxes for the year 1949 upon the grounds that the taxes had been compromised and settled. On February 3, 1953, the taxpayers sought a redetermination of the income tax deficiency in the United States Tax Court. The principal question in the Tax Court and District Court cases was whether a settlement between the United States and the taxpayers of the amount due under a construction contract including the settlement of the taxpayers' liability for income taxes on the amount paid to them. The Tax Court held that it did not, and the District Court, after overruling an objection to its jurisdiction, held that the settlement did include any liability for income taxes on the amount received. The questions presented grew out of the same facts, and the cases were consolidated on appeal. We have

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[1] Mrs. Sanders is involved in these cases because of her interest under the community property laws of Oklahoma.

concluded that the decision of the Tax Court that the settlement did not include the taxpayers' liability for income taxes is correct. It is therefore unnecessary to consider the jurisdiction of the District Court.

Leo Sanders had been engaged in the general contracting and construction business for many years. He kept his books on the accrual method of accounting. On June 6, 1942, he entered into a contract with the United States under which he agreed to do certain construction work in connection with the Oklahoma Aircraft Assembly Plant at Oklahoma City, Oklahoma. He completed the job early in 1943. During the construction period, considerable changes were made in the plans and specifications, and there were demands that much of the work be accelerated. As a result, the cost of construction was greatly increased and Sanders made claims for additional compensation. It was determined that some of the claims were justified, and Congress appropriated over $1,600,000.00 to adjust them.

To prevent the running of the statute of limitations, Sanders brought an action in the United States Court of Claims against the United States and sought a judgment for $2,254,420.37. The purpose of the action was to recover an amount alleged to be due on the construction contract. The Department of Justice took charge of the defense of the case. The complaint was not predicated upon a claim for taxes of any character. Representatives of the Department of Justice conferred with the taxpayer, his attorneys and accountants. It was conceded that the United States was indebted to Sanders, and an investigation was made to determine the amount and to verify the cost figures prepared by Sanders' auditor. During this investigation, an examination of Sanders' tax records and returns was made. During the investigation, an attorney for the Department of Justice told Sanders that upon receipt of any settlement money he would have a tax problem and that he should employ a good tax lawyer. On June 29, 1949, after

extensive oral negotiations, a settlement was effected under which the United States agreed to pay Sanders $955,101.71, in full settlement of his claims. Sanders' offer to accept this sum stated:

> "I hereby offer to accept the sum of $954,100.00, which includes bond premium of $14,100.00, in full settlement of all claims which are included in the above entitled suit and of all claims growing out of Contract W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant near Oklahoma City, Oklahoma. To this should be added the payment of retained percentage in the amount of $1,001.71, making a total of $955,101.71."

The United States, through the Attorney General's office, accepted this offer in a letter which stated in part:

> "Please be advised that the acceptance of your offer to compromise and the filing with the Court of Claims of your Motion to Dismiss the petition, which has been furnished this Department to be held in escrow pending receipt by you of the amount mentioned above, covers all claims arising out of the contract whether or not they are set forth in the petition."

On June 30, 1949, Sanders and an officer in the Army Engineer Corps, acting for the United States, signed a supplemental agreement which modified the original contract in accordance with the compromise settlement agreed upon between the parties and which stated:

> "Upon payment of the above amount agreed to as a compromise settlement, and retained percentage in the amount of $1,001.71, all matters between the Contractor and the Government arising by reason of or in connection with Contract No. W-957-eng-968 will have been settled, and, the contractor hereby releases the Government from any and all claims now filed or

to be filed in the future, arising from or in connection with Contract No. W-957-eng-968, as amended."

Upon receipt of the settlement money, Sanders dismissed his action with prejudice.

On September 15, 1950, Leo Sanders filed a tentative income tax return for 1949 which did not include the amount received under the settlement. Thereafter, an agent of the Bureau of Internal Revenue insisted, without success, upon the filing of a completed return. In 1952, the Commissioner determined that the amount Sanders received from the settlement was income, and assessed a deficiency with penalties and interest. Jeopardy assessments, distraint and tax liens were filed against the property of Sanders. On September 12, 1952, Sanders and his wife filed a joint return for 1949 in which the amount received in the settlement was reported as a capital gain. A capital gain tax of $247,694.44 was paid. Sanders testified that this return was made at the suggestion of the Director of Internal Revenue for Oklahoma, who stated that he believed that the property would be released upon such payment. At the time the liens were filed, the Commissioner requested proper officials of the United States to withhold from Sanders the payment of $49,279.23, which was admittedly due on another contract, and apply the amount on the taxes owing.

We think that there is a total lack of evidence to show that the settlement of the contractual claims which Sanders was asserting against the United States included a settlement of the income taxes which would be due on the amount received under the settlement. When the settlement was made, no taxes were due. No mention of income tax liability was made in any of the written documents. The evidence relied upon to sustain the position of the taxpayers was the testimony of Sanders and his assistant. They relate to observations which appear at most to be the expression of opinion by an attorney for the Department

of Justice to the effect that there would be no income taxes due.[2] The taxpayer discussed the matter with the Deputy Attorney General and made no mention to him that his tax liability was also to be settled. The taxpayers' auditor was present when the final settlement was agreed upon, and he was not told that the settlement would include a release of liability for income taxes. All of the investigations and the negotiations between the parties were carried on to determine the amount due Sanders for services in performing the contract. The complaint in the litigation which was settled by the agreement asked only for a judgment in the sum due for services performed under the contract. When that amount was agreed upon and paid, it was income the same as though the sum had been specified in the contract. There is clearly no basis for holding that the oral statement of an attorney for the Department of Justice was sufficient to constitute a contract to relieve the taxpayers of payment of income taxes on the amount received.

Sanders testified that he would not have accepted the settlement had he known that the amount received thereunder was to be taxable. Even if this were true, there is no evidence that anyone representing the United States agreed that the important item of income tax was to be settled. Neither Sanders nor his attorney and accountants claimed that the taxes were included in the settlement until long after its execution. In the 1952 return and in a letter written in October, 1952, Sanders' tax attorney referred

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[2] One of these statements was alleged to have been made while Sanders and the attorney were traveling from Tulsa to Washington; another, over the telephone in Washington; and a third during the meeting in Washington at which the attorney, Sanders, his assistant and one of his auditors were present. In relating what the attorney said relating to taxes, the assistant testified that during the negotiations in Washington just prior to the final settlement, "Mr. Palmes said there will be no negotiation, there will be no taxes. This looks to me like an excellent settlement for you." The auditor testified that reference was made to renegotiation but he heard nothing about income tax.

only to the question of whether the income could be considered as a capital gain.

Furthermore, there was no tax dispute and even if the settlement was intended to include tax liability, it did not have the approval of the Commissioner, Secretary or Under Secretary of the Treasury, or any Assistant Secretary of the Treasury and no question of tax liability had been referred to the Department of Justice for prosecution or defense.

Sec. 26 U.S.C.A. Sec. 3761 provides:

"(a) AUTHORIZATION. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

"(b) RECORD. Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

"(1) The amount of tax assessed,

"(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

"(3) The amount actually paid in accordance with the terms of the compromise."[3]

Inasmuch as there was no tax dispute referred to the Department of Justice here, the only compromises authorized by the Revenue Act are those approved by one of the Treasury officials named in the statute. *Botany Worsted Mills* v. *United States*, 278 U.S. 282; *Anderson* v. *P. W. Madsen Inv. Co.*, 10 Cir., 72 F.2d 768; *Bank of New York* v. *United States*, 3 Cir., 170 F.2d 20; *Joyce* v. *Gentsch*, 6 Cir., 141 F.2d 891; *Brast* v. *Winding Gulf Colliery Co.*, 4 Cir., 94 F.2d 179; *Leach* v. *Nichols*, 1 Cir., 23 F.2d 275.

It is equally well established that the United States may not be estopped by the unauthorized acts of its agents nor may such agents waive the rights of the United States by their unauthorized acts. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380; *Wilber National Bank of Oneonta, Administrator*, v. *United States*, 294 U.S. 120; *United States* v. *Fitch*, 10 Cir., 185 F.2d 471; *United States* v. *Chickasha Cotton Oil Co.*, 10 Cir., 115 F.2d 135.

The alleged statements attributed to the Department of Justice attorney to the effect that Sanders would have no taxes to pay, were made orally. The attorney testified that he had absolutely no authority delegated him under which he could advise anyone that he would not have to pay income taxes.[4] This testimony, as it relates to his authority, is uncontradicted and undoubtedly true.

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[3] All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of such Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of such officers, agencies, and employees. 1950 Reorg. Plan No. 26, Secs. 1 and 2 effective July 31, 1950, 15 F.R. 4935, 64 Stat. 1280. The Commissioner of Internal Revenue, and the General Counsel for the Department of the Treasury, referred to in this section, are officers in the Treasury Department.

[4] The attorney testified as follows:

"Q. And did you hear Mr. Sanders state that you told him

Assuming that the attorney made these statements, they came during the period of negotiations prior to the execution of the written settlement in which no reference to relief from taxes was made. The written words are unmistakably clear that the provisions relating to release from any and all claims growing out of the contract had to do only with obligations of the United States to Sanders by virtue of the contract. Oral statements may be considered to ascertain the subject matter of a written contract or to explain its terms, but they are not admissible to create an additional undertaking. *Maryland* v. *Railroad Company,* 89 U.S. 105; *Nash* v. *Towne,* 72 U.S. 689; *Cohen* v. *New England Mut. Life Ins. Co.,* 7 Cir., 140 F.2d 1, *cert. den.* 322 U.S. 744; *Jordan* v. *Hall-Miller Drilling Co.,* 10 Cir.,

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[4] (Continued)

that he would not have any income taxes to pay?—A. Yes, I heard that testimony.

"Q. Did you make that statement?—A. I positively did not make the statement.

"Q. You are sure, there can be no question about it?—A. There is no question about that. If you want me to explain why I say that I will do it.

"Q. Why are you sure you did not make the statement?

* * * * * * * * *

"The Witness: In the first place, taxes were not involved in this claim. We, in the Claims Division, never handled any taxes in dispute. That part was turned over to the tax division. I knew nothing whatsoever about Mr. Sanders' taxes. I had no authority in so far as the trial attorney of Justice was concerned to bind the attorney general or anyone else.

"All I could do would be to recommend and the higher-ups could agree with me or disagree with me. On occasions they have disagreed with me. I had absolutely no authority delegated to me under which I would have any right whatsoever to tell any claimant that he would not have to pay any income taxes.

"Furthermore, I should say this, that I had no idea about what Mr. Sanders' tax structure was. There would be no way in the world for me to tell or to evaluate the amount of taxes that I might take into consideration in reaching a settlement."

203 F.2d 443; *Lawrence* v. *Keokuk Steel Casting Co.*, 10 Cir., 162 F.2d 929; *American Crystal Sugar Co.* v. *Nicholas*, 10 Cir., 124 F.2d 477.

It is contended that the language used in the settlement documents which stated that all claims made in the Court of Claims action and all other claims growing out of the construction contract were settled, was broad enough to include any liability for income taxes. Such inclusion cannot be found in the words themselves. Income taxes do not arise from or grow out of the contract. They arise by operation of the Internal Revenue Statutes. *Central Bank* v. *United States*, 345 U.S. 639.

There is no merit to the taxpayers' contention that if the amount received is taxable, it should be treated as a capital gain and the tax computed under the provisions of 26 U.S.C.A. 1939 Ed. Sec. 117 (a)(4). The sum which Sanders received from the government was not derived from the "sale" or "exchange" of a capital asset as used in the statute, but was a compromise settlement of amounts claimed for the services rendered. The petition of the taxpayers in the Court of Claims so alleged. The settlement had none of the elements of a "sale" or "exchange" of property. Under the decisions, Section 117 (a)(4) is inapplicable. *Helvering* v. *Flaccus Leather Co.*, 313 U.S. 247; *Roscoe* v. *Commissioner*, 5 Cir., 215 F.2d 478; *Thal* v. *Commissioner*, 6 Cir., 142 F.2d 874; *Gruver* v. *Commissioner*, 4 Cir., 142 F.2d 363; *United States* v. *Burrows Bros. Co.*, 6 Cir., 133 F.2d 772; *Burger-Phillips Co.* v. *Commissioner*, 5 Cir., 126 F.2d 934; *Bingham* v. *Commissioner*, 2 Cir., 105 F.2d 971.

The settlement of the litigation and the belated payment to Sanders represented a sum due him for work performed under the terms of the contract. This was gross income as defined by the Revenue Act. 26 U.S.C.A. 1939 Ed. Sec. 22(a). The object of the suit was to recover for

this work. If the sum had been paid when due, it would have represented ordinary income. The fact that the sum was recovered in a lawsuit or in the settlement of a lawsuit does not change the character of the income regardless of the intervening time. The income must be considered in the light of the claim from which it was realized. *Commissioner* v. *Goldberger's Estate*, 3 Cir., 213 F.2d 78; *Mathey* v. *Commissioner*, 1 Cir., 177 F.2d 259, *cert. den.* 339 U.S. 943; *Durkee* v. *Commissioner*, 6 Cir., 162 F.2d 184; *Swastika Oil & Gas Co.* v. *Commissioner*, 6 Cir., 123 F.2d 382, *cert. den.* 317 U.S. 639; Cf. *Commissioner* v. *Wodehouse*, 337 U.S. 369, 393; *Commissioner* v. *Smith*, 324 U.S. 177; *Hort* v. *Commissioner*, 313 U.S. 28; *Sunray Oil Co.* v. *Commissioner*, 10 Cir., 147 F.2d 962, *cert. den.* 325 U.S. 861.

Prior to the enactment of the Community Property Statute of Oklahoma, Sanders had purchased various pieces of construction machinery and equipment which were his separate property and which he used in his construction business. During the years 1946, 1947, and 1948, some of this machinery and equipment was sold. Sanders and his wife each reported one-half of the long-term capital gain from the sale of this property, and each claimed a deduction for one-half of the depreciation sustained on the property for those years, under Section 23 (a) (1) of the Internal Revenue Code of 1939. 26 U.S.C.A. Sec. 23 (a) (1). The Commissioner and the Tax Court held that the full amount of the capital gains derived from the sale of the separately owned property was taxable to Sanders, and allowed depreciation on the basis of one-half to Sanders and one-half to his wife, as claimed in their returns.

Sanders does not question the Commissioner's action in holding that the full amount of the capital gains should be taxed to him, but contends that since he was required to report all the capital gains from his separately owned property, he should be entitled to all the depreciation on this property. The Tax Court in upholding the action of

the Commissioner relied upon *Stewart* v. *Commissioner*, 5 Cir., 95 F.2d 821. That case holds that under the Texas Community Property Statute, which is similar to that of Oklahoma, the income from the wife's separate estate is community property and deductions constituting expenses, depreciation, interest, and taxes pertaining to the wife's separate property must be equally divided between the husband and wife. This is a distinct disadvantage to the spouse owning all the property, but as the Tax Court stated in the instant case, "The petitioners must take the tax disadvantages along with the tax advantages pertaining to taxpayers living in community property states." We find no error in the court's ruling. *Commissioner* v. *Wilson*, 5 Cir., 76 F.2d 766; *Commissioner* v. *Terry*, 5 Cir., 69 F.2d 969.

The Tax Court upheld the Commissioner in the assessment of penalties and interest because of failure to file returns within the statutory periods. Section 291 (a) of the 1939 Code provided: "In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate." 26 U.S.C.A. 1939 Ed. Sec. 291(a).

Under the provisions of the statute the penalties provided for are mandatory unless it is shown that the failure to file a return was due to reasonable cause and not willful neglect. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219; *Spies* v. *United States*, 317 U.S. 492; *Cedarburg Canning Co.* v. *Commissioner*, 7 Cir., 149 F.2d 526; *Fides, A. G.* v. *Commissioner*, 4 Cir., 137 F.2d 731, *cert. den.* 320 U.S. 797; *J. K. McAlpine Land & Dev. Co.* v. *Commissioner*, 9 Cir., 126 F.2d 163; *Logan Coal & Timber Ass'n* v. *Helvering*,

3 Cir., 122 F.2d 848; *West Side Tennis Club* v. *Commissioner*, 2 Cir., 111 F.2d 6, *cert. den.* 311 U.S. 674; *Noteman* v. *Welch*, 1 Cir., 108 F.2d 206.

The burden of establishing that the failure to file a return was due to reasonable cause is upon the taxpayer. *Hatfried, Inc.* v. *Commissioner*, 3 Cir., 162 F.2d 628; *Paymer* v. *Commissioner*, 2 Cir., 150 F.2d 334; *Blenheim Co.* v. *Commissioner*, 4 Cir., 125 F.2d 906; *Girard Inv. Co.* v. *Commissioner*, 3 Cir., 122 F.2d 843, *cert. den.* 314 U.S. 699; *Tinkoff* v. *Commissioner*, 7 Cir., 120 F.2d 564; *Plunkett* v. *Commissioner*, 1 Cir., 118 F.2d 644.

Reasonable cause has been defined as ordinary business care and prudence. Treas. Reg. 103, Sec. 19,291-1; *Heywood Lumber & Mining Co.* v. *Commissioner*, 2 Cir., 178 F.2d 769; *Southeastern Finance Co.* v. *Commissioner*, 5 Cir., 153 F.2d 205.

Whether the taxpayer has met the burden of proof imposed upon him is a question of fact for the tax court. *Commissioner* v. *Lane-Wells Co., supra; Hatfried, Inc.* v. *Commissioner, supra; Credit Bureau of Greater N. Y.* v. *Commissioner*, 2 Cir., 162 F.2d 7; *P. Dougherty Co.* v. *Commissioner*, 4 Cir., 159 F.2d 269, *cert. den.* 331 U.S. 838; *Southeastern Finance Co.* v. *Commissioner, supra; Paymer* v. *Commissioner, supra; Fides, A. G.* v. *Commissioner, supra.*

The taxpayers filed tentative or skeleton returns which contained no detailed information as to income or deductions. The completed returns were not filed until a number of years after the due date. The taxpayers' books were not posted and an effective audit could not be made. The last payments from the United States were received by Sanders in 1949, and a return was not filed until September of 1952, after notice of deficiencies had been given and the liens had been filed. The record discloses sufficient evi-

dence to sustain the decisions of the Tax Court in upholding the assessment of penalties and interest.

The Commissioner requested the General Accounting Office to withhold the payment of any sums which were due the taxpayers on other contracts. It is clear that the United States has the same right as any creditor to apply unappropriated moneys in its possession toward the payment of debts due it. 31 U.S.C.A. Secs. 44, 71, 74; *United States* v. *Munsey Trust Co.*, 332 U.S. 234; *McKnight* v. *United States*, 98 U.S. 179; *United States* v. *American Surety Co. of N.Y.*, 5 Cir., 158 F.2d 12. The taxpayers are entitled to have credited on the taxes due, all amounts which have been paid and such sums due them which have been withheld.

The Tax Court decisions in Nos. 4968, 4969, and 4970 are affirmed.

The judgments of the District Court for the Western District of Oklahoma in Nos. 5024 and 5070 are reversed.

Separate judgments in the following words were entered on August 17, 1955, in Cases Nos. 4968, 4969 and 4970:

> "Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.
>
> "This cause came on to be heard on the transcript of the record from the Tax Court of the United States and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby affirmed."

Separate judgments in the following words were entered on August 17, 1955, in Cases Nos. 5024 and 5070:

"Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the United States District Court for the Western District of Oklahoma for further proceedings in accordance with the views expressed in the opinion of this court."

[By order of September 2, 1955, the time for filing the petition for rehearing of Leo Sanders *et al.*, was extended to September 21, 1955.]

The petition for rehearing by Leo Sanders *et al.*, was filed September 21, 1955.

On September 30, 1955, the following order was entered:

"Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

"These causes came on to be heard on the petition of Leo Sanders and Jessie H. Sanders for a rehearing herein and were submitted to the court.

"On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied."

APPENDIX B

SEC. 291. FAILURE TO FILE RETURN.

(a) [as amended by Sec. 172(f)(4), Revenue Act of 1942, *supra*] In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612(d)(1).

* * * * * * * * * *

(26 U.S.C. 1952 ed., Sec. 291.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.* — Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

(b) *Liability of Transferee or Fiduciary.* — No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war-profits, excess-profits, or estate tax, (2) the amount of the liability, at

law or in equity, of a transferee of property of a donor in respect of any gift tax, or (3) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (U.S.C., Title 31, 192) in respect of any such tax.
(26 U.S.C. 1952 ed., Sec. 3653.)

28 U.S.C.:

SEC. 2201 [as amended by Section 111, Act of May 24, 1949, c. 139, 63 Stat. 89] *Creation of Remedy*—

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * * * * * * * * *

SEC. 2410. *Actions affecting Property on Which United States Has Lien.*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. The United States may appear and answer, plead or demur within sixty days after service, or such further time as the court may allow.

* * * * * * * * * *

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	5
Argument	10
Conclusion	15

CITATIONS

Cases:

Botany Mills v. *United States*, 278 U.S. 282	12
Commissioner v. *Lane-Wells Co.*, 321 U.S. 219	14
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380	12
Fisk's Estate, In re, 203 F. 2d 358	14
Glass City Bank v. *United States*, 326 U.S. 265	11
Hart Steel Co. v. *Railroad Supply Co.*, 244 U.S. 294	11
United States v. *Munsey Trust Co.*, 332 U.S. 234	11
Wilber Nat. Bank v. *United States*, 294 U.S. 120	12

Statute:

Internal Revenue Code of 1939:

Sec. 51 (26 U.S.C. 1952 ed., Sec. 51)	2, 13
Sec. 291 (26 U.S.C. 1952 ed., Sec. 291)	3, 13
Sec. 3670 (26 U.S.C. 1952 ed., Sec. 3670)	4, 11
Sec. 3671 (26 U.S.C. 1952 ed., Sec. 3671)	4, 11
Sec. 3761 (26 U.S.C. 1952 ed., Sec. 3761)	5, 12

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 595

LEO SANDERS and JESSIE H. SANDERS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 59-69) are reported at 21 T. C. 1012. The findings of fact and conclusions of law of the District Court (R. 275-299) are not reported, but its opinion (R. 244-270) is reported at 121 F. Supp. 584. The opinion of the Court of Appeals (Pet. App. A) is reported at 225 F. 2d 629.

JURISDICTION

The judgments of the Court of Appeals were entered on August 17, 1955. (Pet. App. A, pp. xiv-xv.) A petition for rehearing was denied on September 30, 1955. (Pet. App. A, p. xv.) The petition for a writ of certiorari was filed on De-

cember 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether a settlement between the United States and the taxpayers of the amount due under a construction contract included a settlement of the taxpayers' liability for income taxes on the amount paid to them.

2. Whether the Commissioner properly assessed against the taxpayers delinquency penalties for the years 1943, 1944, 1946, and 1949, under Section 291(a) of the Internal Revenue Code of 1939, on account of the failure of taxpayers to file their income tax returns within the time prescribed by law, the specific question being whether the failure of the taxpayers to file on time was due to reasonable cause and not due to wilful neglect, as provided in Section 291(a).

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 51. INDIVIDUAL RETURNS.

(a) [as amended by Section 11(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, and Section 202(c)(1) of the Revenue Act of 1948, c. 168, 62 Stat. 110] [1] *Re-*

[1] The section, as above set out, is applicable to taxable years beginning after December 31, 1947. Section 51(a), as it applied to prior years, contained similar language as far as the requirements of detailing gross income, deductions, and credits were concerned. In view of the fact that there is no difference in substance, we have not set out the exact language of Section 51(a) as it applies to years prior to 1948.

quirement.—Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations.

* * * * *

(26 U. S. C. 1952 ed., Sec. 51.)

SEC. 291 FAILURE TO FILE RETURN [as amended by Sec. 172(f)(4), Revenue Act of 1942, c. 619, 56 Stat. 798].

(a) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per

centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612(d)(1).

* * * * *

(26 U. S. C. 1952 ed., Sec. 291.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount

is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3761.)

STATEMENT

On June 6, 1942, taxpayer Leo Sanders entered into a contract with the United States to do certain construction work at the site of the Oklahoma Aircraft Assembly Plant at Oklahoma City, Oklahoma. He started work on the contract in 1942 and completed the job early in 1943. During the construction period, various changes were made in the plans and specifications, as a result of which Sanders was entitled to additional compensation. A dispute arose over the extra amounts due under the contract, but it was determined that some of the

claims were justified and Congress appropriated approximately $1,600,000 to pay them. The appropriation was available only through June 30, 1949. (R. 60-61, 86, 356.)

Several years elapsed while Sanders pressed his claims and, in order to avoid the effect of the statute of limitations, he brought an action on May 17, 1949, in the United States Court of Claims against the United States for a judgment of $2,254,420.37. The Department of Justice took charge of the defense of the case and Sanders carried on negotiations with the Department for the purpose of settlement. On June 29, 1949, after extensive oral negotiations, a settlement was effected under which the United States agreed to pay Sanders $955,101.71, in full settlement of his claim. (R. 61.) In a letter to the Attorney General, Sanders offered to accept that sum (R. 61)—

> in full settlement of all claims which are included in the above-entitled suit and of all claims growing out of contract W-957-eng-968 and of the construction of the Oklahoma Aircraft Assembly Plant.

This offer was accepted by the United States on June 29, 1949, in a letter which stated that "the acceptance of your offer of compromise * * * covers all claims arising out of the contract whether or not they are set forth in the petition." (R. 61.) A motion to dismiss the suit in the Court of Claims was placed in escrow, to be filed upon the receipt by the taxpayer of payment by the United

States. (R. 61-62.) On June 30, 1949, Sanders signed a supplemental agreement, modifying the original contract in accordance with the compromise settlement agreed upon between the parties, and stating that (R. 62)—

> upon payment of the above amount agreed to as a compromise settlement, and retained percentage in the amount of $1,001.71, all matters between the Contractor and the Government arising by reason of or in connection with Contract No. W-957-eng-968 will have been settled, and, the Contractor hereby releases the Government from any and all claims now filed or to be filed in the future, arising from or in connection with Contract No. W-957-eng-968 as amended.

The United States paid Sanders the sum of $955,-101.71 on June 30, 1949. (R. 62.)

On September 15, 1950, Sanders filed a so-called tentative income tax return for 1949 which did not include the amount received under the settlement. Thereafter, an agent of the Bureau of Internal Revenue insisted, without success, upon the filing of a completed return. Meanwhile, Sanders filed so-called tentative returns for the years 1943, 1944, and 1946, which were blank except for his name, address, and the amounts estimated as the tax due. On July 16, 1952, separate returns were filed showing income and deductions for Sanders for the years 1943, 1944, and 1946, and for his wife for 1946. On September 12, 1952, Sanders and his

wife filed a joint return for 1949 in which $940,000 of the amount received under the settlement was reported as a capital gain, and the tax thereon paid. (R. 62-63; Pet. App. A., p. v.)

In 1952, the Commissioner determined that the amount received by Sanders under the settlement agreement was ordinary income rather than capital gain, and determined deficiencies in income tax and twenty-five per cent delinquency penalties against taxpayer and his wife for the years 1943, 1944, 1946, and 1949. Jeopardy assessments were then made and liens filed against the property of Sanders. At the time the liens were filed, the Commissioner requested proper officials of the United States to withhold from Sanders the payment of $49,279.23, which was admittedly due on another contract, and apply the amount on the taxes owing. (R. 59-60, 62, 63; Pet. App. A., p. v.)

On January 26, 1953, the taxpayers filed a declaratory judgment action in the United States District Court for the Western District of Oklahoma against the Commissioner, the District Commissioner, and the Director of Internal Revenue for the District of Oklahoma in which they sought to quiet title in themselves to certain property, to cancel certain liens, and to enjoin the collection of income taxes for the year 1949 upon the grounds that the taxes had been compromised and settled. On August 4, 1954, the District Court entered judgment holding that the Court of Claims case embraced a compromise of all taxes arising out of the

receipt of the monies pursuant to the settlement agreement; enjoining the collection of any taxes with respect to the money paid; cancelling the assessments and liens; and quieting title of Sanders to the properties on which the United States claimed its liens. (R. 299-302; Pet. App. A., p. ii.) On October 15, 1954, the District Court entered an order, vacating a stop order issued by the District Director against payment to the taxpayer, Leo Sanders, of amounts due him under a Government contract. (R. 314-315.) On October 18, 1954, defendants filed notice of appeal from that order. (R. 315-316.) On November 16, 1954, upon an original petition filed in the Court of Appeals by the defendants, that court entered an order cancelling the order of the District Court.

Meanwhile, on February 3, 1953, the taxpayers had sought a redetermination of the income tax deficiency in the Tax Court. (Pet. App. A., p. ii.) On April 5, 1954, the Tax Court, pursuant to its findings of fact and opinion promulgated March 29, 1954, ordered and decided that there were deficiencies in income tax, and additions for delinquency, for the years 1943, 1944, 1946, and 1949. (R. 69-70.) Specifically, the Tax Court found that the settlement of the Court of Claims case did not include or relieve Sanders from income taxes on the amounts received by him; that the amounts derived from the settlement represented ordinary income; and that Sanders and his wife failed for each of the taxable years to file the returns required by law, within the time prescribed by law; and

failed to show that failure in any instance was due to reasonable cause and not to wilful neglect. (R. 62-63.)

The questions presented grew out of the same facts, and the cases were consolidated on appeal. The Court of Appeals concluded that the decision of the Tax Court was correct, and that it was therefore unnecessary to pass on the jurisdiction of the District Court. (Pet. App. A, pp. ii-iii.)

ARGUMENT

1. Petitioners urge primarily (Pet. 20-24) that the settlement of Sanders' claims on a construction contract with the United States included a settlement of his liability for income taxes on the amount paid thereunder. The argument is without legal or factual substance. It has no basis in the settlement agreement itself, and—even assuming the propriety of going outside the agreement on such an issue—the Court of Appeals correctly held that the parol evidence they introduced could not help the petitioners.[2]

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[2] Insofar as the issue is factual, the Court of Appeals' affirmance of the Tax Court and reversal of the District Court defeats the findings of the latter as clearly erroneous. In view of this resolution of the conflict between the Tax Court and the District Court, it was of course unnecessary, as the Court of Appeals held, to consider the serious question whether the District Court's action exceeded its jurisdiction. The contention (Pet. 26-30) that the Tax Court should have withheld action until after the District Court had exercised and exhausted its jurisdiction is without merit. In fact, taxpayers themselves invoked the jurisdiction of the Tax Court and it appears to be well settled, even assuming jurisdiction in the District Court, that where two tribunals have concurrent

Seeking to vary the terms of the agreement, which clearly fail to support their construction, petitioners assert that they were misled by alleged statements of a Department of Justice attorney and the Acting Attorney General to the effect that the settlement eliminated any tax liability on the amount paid under the compromise. As the Court of Appeals observed, the attorney flatly denied having made any such statements and correctly pointed out his total lack of authority for them. Similarly, the then Deputy Attorney General, who acted for the Attorney General, testified in both cases that he gave no consideration to taxes in the settlement and did not consider any tax claims that might be asserted by the United States against Sanders. (R. 198-199.)

Even apart from this evidence, however, which accords fully with the written terms of the agree-

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jurisdiction, the judgment first obtained becomes *res judicata*, regardless of which suit was first instituted. *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294.

Similarly, in view of the holding of the Court of Appeals that the settlement agreement did not include liability for taxes on the amount received, it is clear that the District Court erred in entering its order vacating the stop-order issued by the District Director to hold up funds due Sanders under a Government contract in the sum of approximately $49,000. The Comptroller General had the clear right to offset the amounts due Sanders under that contract against his outstanding liabilities as assessed (*United States* v. *Munsey Trust Co.*, 332 U.S. 234), and, under the provisions of Sections 3670 and 3671 of the Internal Revenue Code of 1939, *supra*, pp. 4-5, the United States had liens against any amounts due Sanders on account of the outstanding assessments (*Glass City Bank* v. *United States*, 326 U.S. 265). Taxpayers' allegation of error in this respect (Pet. 30) is therefore also without merit.

ment, there are insuperable legal obstacles to petitioners' argument. Their taxes for 1949 had not even been computed at the time of the agreement, June 30, 1949. Thus, there existed no tax claims of any kind either by or against the United States. Still more clearly, then, there had been no tax dispute referred to the Department of Justice and there was no basis for exercise of the Attorney General's authority only to "compromise any [tax] case after reference to the Department of Justice for prosecution or defense." 26 U.S.C. 3761, *supra*, p. 5. In the circumstances, the only compromise conceivably permissible under Section 3761 would have been one approved by the Treasury officials named therein. *Botany Mills* v. *United States*, 278 U.S. 282. The written agreement the Department of Justice made squares with this familiar limitation on its authority. Assuming, contrary to their testimony, that, on a matter involving so large a sum, the officials in question undertook oral commitments different from what they wrote and from what was authorized, such action would afford no valid ground for petitioners' claim. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380; *Wilber Nat. Bank* v. *United States*, 294 U.S. 120.

2. Equally unsubstantial as a basis for certiorari is the factual contention that the delinquency penalties should not have been assessed because, it is asserted (Pet. 24-26), the years of delay before petitioners filed their returns should have been excused as being "due to reasonable cause and not

due to willful neglect," under 26 U.S.C. 291 (a), *supra,* pp. 3-4. It is clear, of course, that the skeleton forms originally filed by the petitioners within the alloted time were not legal returns under Section 51 of the Internal Revenue Code of 1939, *supra,* pp. 2-3, because they did not set forth specifically items of income, deductions, and credits, and contained no information from which an audit could be made. In fact, taxpayers' books were not even posted. Returns containing complete information were not filed until July and September, 1952, long after the returns were legally due and after expiration of extensions granted by the Commissioner. Sanders' excuses (Pet. 25-26)—that he did not know whether there would be a profit or loss until after he received the settlement payment, and that he had insufficient funds with which to bring his books up to date so that returns could be prepared—are insufficient in light of the evidence to constitute "reasonable cause," and the Tax Court and the Court of Appeals so held. (R. 67-69; Pet. App. A, pp. xiii-xiv.) As the Tax Court pointed out, the fact that Sanders' claims on the construction contract were not settled until June 30, 1949, certainly did not prevent him from determining what his income was for 1943, 1944, and 1946. The work was completed in 1943 and, under the accrual method of accounting which he employed, he could have reported for 1943 the income which was not in dispute and other income properly accruable. Nevertheless, it was not until eight years later that he filed a 1943 return. In fact,

although the last payments on the contracts were received in 1949, it was not until some three years thereafter that returns for any of the years 1943, 1944, 1946 and 1949 were filed.

Sanders' alleged lack of funds with which to employ accountants (Pet. 25) is without support in the record, for he conceded (R. 68) income of about $95,000 for 1943, about $13,000 for 1944, and $160,000 for 1946. And in 1949 he hired a firm of certified public accountants to audit his books (R. 126-127.)

In a word, petitioners wholly failed to carry their burden of showing reasonable cause for their extreme delinquencies. In the circumstances, imposition of the penalties was not merely authorized; it was mandatory. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219.[3]

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[3] Petitioners are plainly mistaken in their assertion (Pet. 26) of a conflict on this issue of fact with *In re Fisk's Estate*, 203 F. 2d 358 (C.A. 6), where reliance by an executrix upon an attorney to file a timely return was held reasonable cause for the failure to file.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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